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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. [redacted] 198

JOHN T. BOURN, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD AND N. E. HALABY, *Administrator, Federal Aviation Agency.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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JOHN T. BOURN, *Petitioner,*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner, John T. Bourn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Civil Aeronautics Board on review.

Opinion Below

The Court below did not render a written opinion. The judgment of the Court is appended hereto as Appendix A.

Jurisdiction

The jurisdiction of the court is invoked pursuant to the provision of Sec. 1486 (f), 49 U.S.C. of the Federal Aviation Act of 1958, and as further provided in Tit. 28, U.S.C.,

Sec. 1254 (1). The judgment of the court is dated March 24, 1964 and entered the same day.

Questions Presented

The questions presented are:

1. Whether the Administrator of the Federal Aviation Agency could legally obtain evidence by invoking the use of the Federal Rules of Civil Procedure adopted by this Court for use only by the District Courts of the United States.

2. Whether such use was in violation of the due process of law clause in the Constitution of the United States.

3. Whether such use was detrimental to the property rights of petitioner.

4. Whether the respondents below violated procedural due process of law in revoking petitioner's certificates in which he had vested property rights.

Constitutional Provision, Statute, and Federal Rule of Civil Procedure 36 Involved

Amendment V, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U.S.C. Tit. 28 Secs. 723 b, 723 c, read, as follows:

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules; for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U.S.C., Title 28, §§ 723b, 723c.]

Federal Rule of Civil Procedure No. 36 reads as follows:

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(b) EFFECT OF ADMISSION. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Statement of the Case

Petitioner is the holder of commercial pilot and flight instructor certificates issued by the Administrator of the Federal Aviation Agency, which were revoked by the regional counsel for the Administrator on August 4, 1961,

effective August 23, 1961. On September 12, 1961, the examiner advised petitioner by letter, informing him that from the Rules of Practice on Safety proceedings he could see that his appeal is a *legal proceeding* "in which both sides present evidence to a hearing examiner who acts as a Judge does at a trial. At the outset of this so-called "trial" the examiner received in evidence, without objection, "Requests for Admission Under F.R.C.P. 36," comprising six pages containing fifty-five questions. The said requests covered substantially the entire charges made against petitioner in the revocation order signed by said counsel. Petitioner herein wrote his answers on the margins thereof. In addition, the examiner held "trials" for seven days, making a record of almost 1200 pages. About six months later he issued an "Initial Decision." It is not known whether such decision was based on, and contained its findings of fact, from the information illegally elicited by the use of Federal Rulcs of Civil Procedure 36; or from the testimony obtained at the seven days of hearings. On appeal by petitioner, the Civil Aeronautics Board upheld the findings of the examiner and the use of said federal rule of civil procedure.

Reasons for Granting the Writ

This case presents the important question whether an examiner can act as a federal district court judge and invoke the use of the Federal Rules of Civil Procedure, which Congress enacted exclusively for the use of the federal district courts, and gave no authority whatsoever for its use by a federal administrative agency.

1. The lower court, in effect, held that the use of F.R.C.P. 36 was proper, and not illegal, by affirming said order, but wrote no opinion, or decision, in the disposition of the

petition for review filed by petitioner herein. This affirmation was made by the lower court in spite of the fact that it has been held many times that the system of rules of evidence in force for trials by jury, or courts of equity, is *not* applicable, either by historical precedent, or by sound practical policy, to inquiries of *fact* determinable *by administrative tribunals*, or officers. *Federal Trade Comm.* v. *Cement Institute*, 333 U.S. 683, 705, 706; 68 S.Ct. 793; 92 L. Ed. 1009; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; 61 S.Ct. 524; 85 L. Ed. 624; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, 230; 59 S.Ct. 206; 83 L. Ed. 126; *Interstate Commerce Comm.* v. *Baird*, 194 U.S. 25, 44, 24 S.Ct. 563; 48 L. Ed. 860.

2. The lower court erred in holding that petitioner was not denied procedural due process of law by the invocation of F.R.C.P. 36. The Federal Aviation Act of 1958, supra, does not authorize the use of the federal rules of civil procedure in eliciting evidence, or facts, in a hearing by an examiner.

3. Statutory prescribed procedure must be strictly pursued, specifically in regard to *suspension or revocation of a license*. 2 Am Jur 2d, Administrative Law, Sec. 353.

4. The Act of June 19, 1934, supra, prescribed said rules for the district courts of the United States and for the courts of the District of Columbia, and not for use by administrative agencies. The lower court erred in holding that the use of said rule was not in viola. on of due process in procedural requirements; or in violation of procedural due process, it being shown that petitioner's certificates are vested property rights.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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(1488-6)

APPENDIX A

Filed March 24, 1964. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,163

JOHN T. BOURN, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD AND N. E. HALABY, *Administrator, Federal Aviation Agency, Respondents.*

On Petition for Review of Order of the Civil Aeronautics Board

Before: PRETTYMAN, Senior Circuit Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Civil Aeronautics Board on review in this case is hereby affirmed.

Per Curiam.

Dated: March 24, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

JOHN T. BOURN, PETITIONER

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CIVIL AERONAUTICS BOARD AND N. E. HALABY, ADMINISTRATOR, FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 198

JOHN T. BOURN, PETITIONER

v.

CIVIL AERONAUTICS BOARD AND N. E. HALABY, ADMINISTRATOR, FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

The underlying issue is whether the Civil Aeronautics Board erred, in an airman's license revocation proceeding, by admitting into the record petitioner's answers to a "Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure." If so, subsidiary questions are: (a) whether petitioner's failure to raise the objection before the agency foreclosed judicial consideration of the matter and (b) whether, in any event, the admission was prejudicial error.

Petitioner is the holder of a commercial pilot and a flight instructor certificate. He owns and operates a helicopter which he uses for cropdusting and selling helicopter rides at public events such as State fairs. After an investigation conducted pursuant to Section 609 of the Federal Aviation Act, 49 U.S.C. 1429,[1] the Administrator of the Federal Aviation Agency found that petitioner had committed various violations of the Civil Air Regulations and ruled that safety in air transportation and the public interest required the revocation of petitioner's certificate.

Upon appeal, an evidentiary hearing was held before a Civil Aeronautics Board hearing examiner (Tr. 25-1288).[2] The examiner found that petitioner had violated various Civil Air Regulations by (1) flying his aircraft too low on four occasions over fairgrounds while a State fair was in progress, thereby endangering the lives and property of both his passengers and of persons attending the fair (Tr. 1439-

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[1] Under Section 609 of the Federal Aviation Act, the Administrator is empowered, after investigation, to issue an order suspending or revoking in whole or in part any airman's certificate. The airman so affected may appeal this action of the Administrator to the Board, where he is entitled to a hearing in which the Board is not bound by the Administrator's findings of fact, and the appeal stays the effectiveness of the Administrator's order (except in a situation not here relevant where the Administrator advises the Board that an emergency exists and that safety in air transportation requires the immediate effectiveness of his order). The Administrator's order also served as the Administrator's complaint to the Board in accordance with the Board's Rules of Practice (14 C.F.R. 301.14 (1960)).

[2] Transcript references are to the unprinted pages of the original record.

1443); (2) landing his aircraft on the picnic grounds in a State park while picnics were in progress so as to endanger the lives and property of the picnickers (Tr. 1443-1445); (3) flying his aircraft while it was in an unairworthy condition over a populated area of Los Angeles County, California (Tr. 1445-1447); (4) lifting off in his aircraft in an attempt to avoid payment of a repair bill with an employee of the repair station clinging to its frame (Tr. 1451-1453); and (5) failing to maintain proper entries in his logbooks of his flight time and the repairs made to his aircraft (Tr. 1445-1451).[3]

The examiner ruled that these violations and petitioner's overall past record demonstrated such a disregard for safety as to require revocation (Tr. 1401-1405). The Board, on appeal, upheld the examiner's findings of violation and ruled that safety in air commerce and the public interest required the revocation of petitioner's license (Tr. 1453). It further ruled that the need for revocation was also supported by the history of petitioner's past violations of the regulations, as evidenced by an earlier revocation of his license.[4] The court of appeals affirmed. It entered a judgment (Pet. App. A), but rendered no opinion.

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[3] This conduct violated Sections 60.17, 60.12, 43.20, and 43.23 of the Civil Air Regulations.

[4] The Board pointed out that the prior revocation, which occurred in 1958, was for eleven separate violations of the safety regulations by the petitioner involving the carriage of passengers or the conducting of cropdusting operations without a valid rating and the making of passes over a schoolhouse during school hours at less than the minimum prescribed altitudes of flight (Tr. 1451).

Prior to the hearing before the examiner, counsel for the Administrator served petitioner with a document entitled "Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure", to which petitioner responded without objection.[5] These requests, together with petitioner's response, were admitted into the record by the examiner. Petitioner's complaint is that the examiner should not have allowed his answers into the record because, he says, they were obtained through the invocation of the Federal Rules and the use of these Rules by an administrative agency was improper. Petitioner, however, offered no objection to the Administrator's requests and freely supplied the requested information. His counsel did not object to their receipt in the record, although specifically asked by the hearing examiner whether he had any objection to their introduction (Tr. 32-33). For this reason alone he should not be heard to complain.[6] The issue is foreclosed from con-

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[5] Petitioner's response was made by writing his answers on the face of the request served on him (Tr. 1662-1668).

[6] The case law relied upon by petitioner, rather than supporting his contention that the action here was improper, fully sustains it. These cases hold that the technical rules of evidence dealing with the exclusion of evidence in judicial proceedings are not binding on administrative agencies, and that an agency's procedures in connection with evidentiary matters may be more, rather than less, flexible than those of the courts. *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 705-706; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229-230; *Interstate Commerce Comm'n* v. *Baird*, 194 U.S. 25, 44.

sideration for the additional reason that at no time was any objection urged before the administrative agency, nor has petitioner suggested "reasonable grounds for failure to do so." Federal Aviation Act, § 1006(e), 49 U.S.C. 1486(e); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453; *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (C.A. D.C.); *Nebraska Department of Aeronautics, et al.* v. *Civil Aeronautics Board*, 298 F. 2d 286 (C.A. 8).

In any event, petitioner's case has not been prejudiced by the receipt of his admissions into the record, for the testimony he gave as a witness before the examiner was in substance the same as the information supplied in answering the "Request for Admissions".[7]

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[7] This was primarily to the effect that he was the owner and operator of the aircraft, that he piloted the aircraft at the time that various incidents occurred, and that he was ignorant of the speed-altitude limitations of his aircraft (Tr. 250-281; 315-402; 505-565; 1111-1119).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1964.

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